In the Supreme Court of the United States

OCTOBER TERM, 1899.

No. 368.

THE BIENVILLE WATER SUPPLY COMPANY, Appellant.

VS.

THE CITY OF MOBILE, Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF OF APPELLANT ON MOTION OF APPELLEE TO DISMISS OR AFFIRM.

Counsel for appellee has made a motion in this Honorable Supreme Court of the United States to dismiss or affirm under Rule 6, subdivision 5 of this court. This rule provides that such motion must be "on the ground that although the record may show that this court has jurisdiction, it is *manifest* the writ of error or appeal was taken for *delay only*, or that the question on which the jurisdiction depends is *so frivolous* as not to need further argument."

That this court has jurisdiction is manifest.

The bill is filed to restrain the city under powers derived from the Legislature from violating its contract with appellant under Article 1, Section 10, of the constitution of the United States, which reads as follows:

"No state shall—pass—any law impairing the obligation of contracts."

Then it must be manifest that the appeal was taken —First, for *delay only;* or second, that the question of impairing or violating its contract is so *frivolous* as not to need further argument.

First. How can it be plausibly contended under the facts as stated by the bill, that the appeal is taken for *delay only?* The contract with the city will expire in July, 1900, or in less than one year. The application for an injunction or restraining order has been denied by the court and the bill has been dismissed by the United States Circuit Court. No damage has been done or can be done to the city by delay. It is left free to proceed to sell water under its Stein's system of water-works and to erect other water-works, and is so doing in both instances, not at all impeded or interfered with by appellant. Then how can the city be injured, or the Bienville Water Supply Company benefitted in any way by a delay until the cause can be regularly reached and heard by this court?

If there were a moneyed decree against the Bienville Water Supply Company; or a restraining order, or an injunction against the city, or any other process from the court by which the city could be injured by delay or time, then such motion might be entertained by the court. The record shows that all costs have been paid by the appellant, nothing has been accomplished by its bill, no harm has been or is being done to the city, so the proposition that the appeal was taken for "delay only" is not sustained by any of the facts of this cause.

Second. Then is the question on which the jurisdiction depends "*so frivolous* as not to need further argument?"

It is settled that the motion to affirm will not be entertained unless there is a color of right to the motion to dismiss.

Davis vs. Corbin, 113 U. S., 687.
Ackley School District vs. Hall, 106, U. S., 428.
Micas vs. Williams, 104 U. S., 556.
Hinckly vs. Morton, 103 U. S., 764.
Whitney vs. Cook, 99 U. S., 607.

We contend that there is no color of right for the dismissal of this cause.

Should the court, however, be of the contrary opinion and should further entertain the motion to affirm, then we beg leave to present the following in opposition to the granting of such motion.

The city, after having made this contract with the Water Supply Company, and while it is in full force and while the city admits that the Water Supply Company has complied with all of the provisions of the contract, gets possession of another water-works (Stein water-works), is running this water business, selling water to customers, cutting the rates established by and between the city and appellant, and actively competing with this Water Company for selling and furnishing water to customers, besides, reducing the rates, thus taking away some of the customers of the appellant and materially reducing its income, and rendering the Water Company unable to meet the interest on its bonded indebtedness. The investors of $750,000 will poorly be paid by the city paying for 265 hydrants at $50 an hydrant, to wit: $13,250 per annum. The amount a city pays for the use of water for itself as a city, is known not to pay capitalists for such large investments. To supply water for all public buildings, fountains, &c. (as alleged by the bill) free and then to supply the fire department for pay, is no inducement to capitalists to so invest their money. This is a loss. The main inducement is in obtaining the franchise, or right to supply private consumers at private rates. The maximum rates to be charged by appellant are fixed by the charter of the company and less rates are fixed by the contract with the city.

Then is it not a violation of the contract, when the city ruins the income of the Water Company by actively competing with it in selling water to customers and cutting the rates it had agreed upon with the Water Company to be charged its citizens? Is it not the spirit and equity of the contract that it should not be thus violated and did not the Water Company have the right to expect it to be fairly carried out so that it could make some money and not be ruined by the city?

In the case of the Bienville Water Supply Company vs. the City of Mobile, 112 Alabama Reports, page 260,—where the city had refused to pay its water bill and the company had threatened to cut off the water, and the city had obtained an injunction against the Water Company to prohibit it from cutting off the water, Chief

Justice Brickell, in his opinion says—"Treating the case as controlled by the principles applicable to ordinary bills for specific performance, it is insisted by the demurrers, first that the contract providing as it does for the performance of continuous duties extending over a series of years, duties involving personal labor and skill, is not one which a court of Equity will superintend or specifically enforce."—"If the bill be of the character asserted in the first contention, it would be wanting in equity and should be dismissed"—"But the company also owes a duty to the public. Neither it nor the city would be permitted summarily and without making some other provisions for the safety of the public to shut off the water. *We judicially know* that contracts of this character once entered upon become, in a sense *perpetual.*"

112 Alabama, page 264, 265.

This is the construction placed upon this contract and these obligations between appellant and the appellee by the Supreme Court of Alabama.

The further authorities we rely upon as sustaining our contention are :

Walla Walla Water Co. vs. Walla Walla, 172 U. S., page 1.

White vs. City of Meadville, 177 Penn., 595.

Wilson vs. Borough of Rochester, 180 Penn., 59

Atlantic City Water Works vs. Atlantic City, 39 N. Jersey Equity, 367; 48 N. Jersey Law, 378.

Fergus Falls Water Co. vs. Fergus Falls, 65 Fed. Rep., 586.

See also charter of the Bienville Water Supply Company, Preamble and Sections 6, 7, 11, 12, 14, 15, 16—Acts of Ala., 1882-83, page 452.

Besides, the city had no constitutional power to engage in the business of merely selling water to others for profit, as it is doing in running the Stein Water Works, without supplying water for its own use.

Constitution of the State of Alabama, Article I, Section 37, Article 4, Sections 50, 54 and 55.

The authorities cited by appellee on the motion to dismiss or affirm are as follows :

Metcalf vs. Alaska, 130 U. S., 201.

This court decided that the United States District Court and the United States Circuit Court had no admiralty jurisdiction to try a libel suit for damages for the loss of lives. As the same question had been previously passed upon and decided by this court in the Harrisburg 119 U. S., 199, this court affirmed the decree in the lower court because the "appeal was taken for delay only." Most probably to get a compromise.

In Northern Pacific Railroad Company vs. Amato, 144 U. S., 465. This case was where a judgment had been rendered by a jury for $4000. As this court determined that the question of the amount of damages to be assessed was one for the jury alone to pass upon and that the writ of error was taken for delay only it affirmed the judgment. The delay damaged the one-legged employee of the railroad by keeping him out of his money, without any color of right.

In Wilson vs. North Carolina, 169 U. S., 586, Wilson, a railroad commissioner for the State had been removed from office by the Governor of the State. The case had gone to the Supreme Court of the State, and been there decided against Wilson. Wilson brought a writ of error to this court. This court decided on motion to dismiss the case for want of jurisdiction, as the Supreme Court of the State had already decided it, that there was no federal question in it, and dismissed it.

In Chanute City vs. Trader, 132 U. S., 210, a judgment was recovered for damages and costs in the United States Court on bonds and coupons issued by a municipal corporation. Three and a half years thereafter a writ of mandamus to compel the municipal corporation to levy a tax to pay these bonds and coupons was moved for and granted. From this order an appeal to this court was taken. Under these facts—this court says—"There does not appear to be any ground for contending that this court has no jurisdiction ; yet we are entirely satisfied that the reasons assigned for taken the writ of error are

frivolous and that it was taken for delay only." 132 United States, 214.

This delay damaged the judgment creditor by keeping him out of his money, and as there was no grounds for the writ of error, this court affirmed the judgment on motion, of course.

In the case of Douglas vs. Wallace, 161 United States, 346.

This was a suit against a United States Marshal on drafts drawn on him by a United States Deputy Marshal, and assigned to Wallace. These drafts were accepted by the United States Marshal as follows: "Accepted payable when I receive funds to the use of" the drawer of the drafts. The suit was instituted against the United States Marshal in the State Court and judgment obtained. This judgment was affirmed by the Supreme Court of North Carolina. A writ of error was then sued out to this United States Court. This court affirmed the judgment because it considered the writ of error merely taken for delay.

Here again some damage was done to Wallace by this delay, and thus holding up the execution of the judgment.

All these authorities cited present facts very different from this case at bar, and all the other decisions of this court which we have been able to find where the case was dismissed or affirmed on motion, present causes, either on which this court decided that it had no jurisdiction, or where the writ of error was so plainly for delay, which delay damaged the appellee, that the court considered it frivolous.

But says counsel for appellee, "In the case at bar it is sought by this appeal to put clogs in the wheel of progress—the building of a great public work expressly authorized by a sovereign State of the Union."

If we have any rights, we can only appeal to this court to get them. The "wheels of progress" as often so loudly appealed to, have already ridden over justice and

crushed out property too much in many of the States and municipalities, after the capital had been invested.

We respectfully ask that the motion may be denied.

All of which is respectfully submitted by

D. P. BESTOR,

R. H. CLARKE,

Counsel for Appellant.